

U.S. Citizenship and Immigration Services Policy Challenged on Third-Party Worksites

Labor & Employment Law Update

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A U.S. Citizenship and Immigration Services (USCIS) memorandum-issued policy is at the heart of a court case challenging recent H-1B visa denials.

The “Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites” memo was issued on February 20, 2018 without any notice or comment period required by the Administrative Procedure Act (APA). The memo directs adjudicators to ensure a contractor has actual and exclusive “control” of the contractor’s employees at the third-party site as a criterion for visa approval. This requirement comes from a rigid interpretation of the Department of Labor’s definition of “employer” which reads: “Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee....” Instead of considering any one of these circumstances as qualifying, USCIS effectively changed the “or” to an “and,” requiring all of them.

H-1B visa denial rates skyrocketed the past two years, especially for contractors working at third-party worksites. Denial rates for initial H-1B petitions in Fiscal Year (FY) 2018 were 1 % for large technology companies but 34%-80% for companies that put H-1B visa holders at third-party sites. Third-party site work factors highly in IT consulting.

After having many H-1B visas denied or issued for short validity periods, several IT consulting firms filed lawsuits against USCIS. Those lawsuits have been consolidated into one under the aegis of the IT industry trade association ITServe Alliance.

Judge Rosemary Collyer presided over a court hearing of *ITServe Alliance v. USCIS* on 05/09/2019. Plaintiff attorneys produced data showing from FY 2012 to FY 2017, USCIS approved 94 % of their client’s ERP analysts’ H-1B petitions. During FY 2018 to FY 2019, the approval rate dropped to 19%.

Judge Collyer has taken issue with the disparate visa approval rates between different industries and USCIS's requirement that contractors show three years' worth of specific work assignments for H-1B petitioners when they are allowed "nonproductive" time as long as they are paid.

As Judge Collyer considers the case, she will rule on whether discovery is warranted to find out what has caused the different adjudications of H-1B petitions. Not only are H-1B approval rates markedly down for the IT industry, but requests for evidence and H-1B petition processing times have ballooned.

Requests for evidence (RFE) for all H-1B petitions have jumped from below 30% in first quarter FY 2017 to 60% in first quarter FY 2019. Meanwhile the number of petitions approved with a completed RFE has sunk from 80 % to just over 60 %.

Stay tuned as we will continue to provide updates as new information emerges.

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